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Avantgarde Arena Sdn Bhd v Prema Bonanza Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-12ANCvC-202–08 OF 2020
LEONG WAI HONG JC
25 JANUARY 2023

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Civil Procedure — Summary judgment — Triable issues — Purchaser of unit in strata development sued developer for liquidated and ascertained damages for late delivery of vacant possession — Purchaser applied for summary judgment of its claim under O 14 of Rules of Court 2012 — Whether issues raised by developer to oppose the application were triable and warranted granting developer leave to defend the action

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In late July 2012, the appellant ('Avantgarde') entered into a sale and purchase agreement ('SPA') with the respondent developer ('Prema Bonanza') to buy a condominium unit built and sold by the latter. The SPA provided that vacant possession of the constructed condominium and common facilities would be

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delivered to Avantgarde within 54 months from the date of the SPA failing which Prema Bonanza would pay Avantgarde liquidated and ascertained damages ('LAD') as agreed under the SPA. The 54-month completion date was a departure from the statutory contract of sale in Schedule H of the Housing Development (Control and Licensing) Regulations 1989 ('the Regulations') —

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made pursuant to the Housing Development (Control and Licensing) Act 1966 ('the HDA') — which provided that the completion date shall be 36 months. Anticipating that construction would be delayed, Prema Bonanza had, even before it signed the SPAs with the purchasers, obtained the approval of the Controller of Housing ('the Controller') under reg 11(3) of the

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Regulations to extend the completion date to 54 months. In November 2019, the Federal Court in a landmark decision in *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 ('Ang Ming Lee') held, inter alia, that the Controller had no power to waive or modify any provision in the Schedule H statutory

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contract of sale and that reg 11(3) of the Regulations purporting to confer such power on the Controller was ultra vires the HDA. Relying upon *Ang Ming Lee*, Avantgarde sued Prema Bonanza in the sessions court to recover LAD for late delivery of vacant possession beyond the statutorily stipulated 36 months and applied for summary judgment of its claim under O 14 of the Rules of Court

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2012. The sessions court dismissed the O 14 application. In Avantgarde's instant appeal against that decision, Prema Bonanza argued that it had raised several triable issues to warrant the dismissal of the summary judgment application, such as: (a) unlike in *Ang Ming Lee*, Avantgarde knew at the time it signed the SPA that the completion date was 54 months; therefore the

doctrines of estoppel and unjust enrichment operated to prevent Avantgarde from subsequently arguing otherwise; (b) there was a settlement agreement between the parties over the LAD; (c) Avantgarde's suit was time-barred under the Limitation Act 1953; and (d) instead of suing Prema Bonanza, Avantgarde should have filed a judicial review application to challenge and quash the Controller's decision to extend the completion date.

Held, dismissing the appeal:

(1) The two issues of estoppel and unjust enrichment raised against Avantgarde, which entered into the SPA after the extension to the completion date had been obtained, were triable issues which necessitated granting Prema Bonanza leave to defend. *Ang Ming Lee* did not consider the two issues of estoppel and unjust enrichment as the SPA there was entered into before the extension to the completion date was obtained (see paras 36–37).

(2) Whilst *Ang Ming Lee* clearly held that the HDA was a piece of social legislation designed to protect the interests of house buyers, but on the facts of this appeal, it was a triable issue whether Avantgarde could invoke the assistance of the doctrine of social legislation to prevail over the doctrines of estoppel and unjust enrichment (see para 38).

(3) The contention that Avantgarde should have applied for judicial review to challenge and quash the Controller's decision to extend the completion date instead of suing Prema Bonanza was not a triable issue as there was no necessity to file a judicial review application since *Ang Ming Lee* had already decided that the Controller had no power to extend the completion date and that his decision to do so was ultra vires the HDA (see paras 45–46).

(4) Prema Bonanza's contention that Avantgarde's claim was time-barred under the Limitation Act 1953 was a triable issue since more than six years had elapsed since the date of the SPA. So also was Prema Bonanza's contention that there was a settlement agreement between the parties over the LAD as evidenced in a letter dated 14 March 2017 as it raised the question as to whether Avantgarde could still sue for additional liquidated damages in spite of the settlement agreement (see paras 47–55).

[Bahasa Malaysia summary

Pada penghujung Julai 2012, perayu ('Avantgarde') memasuki perjanjian jual beli ('PJB') dengan pemaju responden ('Prema Bonanza') untuk membeli unit kondominium yang dibina dan dijual olehnya. PJB memperuntukkan bahawa milikan kosong kondominium yang dibina dan kemudahan bersama akan diserahkan kepada Avantgarde dalam tempoh 54 bulan dari tarikh PJB sekiranya gagal Prema Bonanza akan membayar ganti rugi tertentu dan

A ditetapkan ('LAD') kepada Avantgarde seperti yang dipersetujui di bawah SPA. Tarikh penyiapan 54 bulan adalah diluar daripada kontrak jualan berkanun dalam Jadual H Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 ('Peraturan tersebut') — dibuat menurut Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('Akta') — yang memperuntukan
B bahawa tarikh penyiapan hendaklah 36 bulan. Menjangkakan bahawa pembinaan akan tertangguh, Prema Bonanza telah, sebelum ia menandatangani SPA dengan pembeli, mendapatkan kelulusan Pengawal Perumahan ('Pengawal') di bawah peraturan 11(3) Peraturan tersebut untuk melanjutkan tarikh penyiapan kepada 54 bulan. Pada November 2019,
C Mahkamah Persekutuan dalam keputusan penting dalam *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 ('Ang Ming Lee') memutuskan, antara lain, bahawa Pengawal tidak mempunyai kuasa untuk mengenepikan atau mengubah suai mana-mana peruntukan dalam kontrak jualan berkanun
D Jadual H dan peraturan 11(3) Peraturan yang bertujuan untuk memberikan kuasa tersebut kepada Pengawal adalah ultra vires Akta. Bergantung kepada *Ang Ming Lee*, Avantgarde menyaman Prema Bonanza di mahkamah sesyen untuk mendapatkan LAD kerana lewat penyerahan milikan kosong melebihi 36 bulan yang ditetapkan oleh undang-undang dan memohon penghakiman
E ringkas tuntutannya di bawah A 14 Kaedah-Kaedah Mahkamah 2012. Mahkamah sesyen menolak permohonan A 14. Dalam rayuan semasa Avantgarde terhadap keputusan itu, Prema Bonanza berhujah bahawa ia telah membangkitkan beberapa isu yang boleh dibicarakan untuk menjamin penolakan permohonan penghakiman ringkas, seperti: (a) tidak seperti dalam
F *Ang Ming Lee*, Avantgarde tahu pada masa ia menandatangani PJD bahawa tarikh siap adalah 54 bulan; oleh itu doktrin estoppel dan pengkayaan yang tidak adil beroperasi untuk menghalang Avantgarde daripada kemudiannya berhujah sebaliknya; (b) terdapat perjanjian penyelesaian antara pihak berkenaan LAD; (c) saman Avantgarde telah dihalang had masa di bawah Akta
G Had Masa 1953; dan (iv) sebaliknya daripada menyaman Prema Bonanza, Avantgarde sepatutnya memfailkan permohonan semakan kehakiman untuk mencabar dan membatalkan keputusan Pengawal untuk melanjutkan tarikh penyiapan.

H **Diputuskan**, menolak rayuan:

(1) Dua isu estopel dan pengkayaan yang tidak adil yang ditimbulkan terhadap Avantgarde, yang memasuki PJD selepas lanjutan kepada tarikh penyiapan diperoleh, adalah isu yang boleh dibicarakan yang
I memerlukan pemberian Prema Bonanza kebenaran untuk membela. *Ang Ming Lee* tidak mempertimbangkan dua isu estopel dan pengkayaan yang tidak adil kerana PJD telah dimeterai sebelum lanjutan kepada tarikh siap diperoleh (lihat perenggan 36–37).

(2) Walaupun *Ang Ming Lee* dengan jelas memutuskan bahawa Akta adalah

sekeping perundangan sosial yang direka untuk melindungi kepentingan pembeli rumah, tetapi berdasarkan fakta rayuan ini, ia adalah isu yang boleh dibicarakan sama ada Avantgarde boleh memohon bantuan doktrin perundangan sosial untuk mengatasi doktrin estoppel dan pengkayaan yang tidak adil (lihat perenggan 38).

(3) Pendapat bahawa Avantgarde sepatutnya memohon semakan kehakiman untuk mencabar dan membatalkan keputusan pengawal untuk melanjutkan tarikh penyiapan dan bukannya menyaman Prema Bonanza bukanlah isu yang boleh dibicarakan kerana tidak ada keperluan untuk memfailkan permohonan semakan kehakiman sejak *Ang Ming Lee* telah pun memutuskan bahawa Pengawal tidak mempunyai kuasa untuk melanjutkan tarikh penyiapan dan keputusannya untuk berbuat demikian adalah ultra vires Akta (lihat perenggan 45–46).

(4) Pendapat Prema Bonanza bahawa tuntutan Avantgarde dihalang had masa di bawah Akta Had Masa 1953 adalah isu yang boleh dibicarakan kerana lebih enam tahun telah berlalu sejak tarikh SPA. Begitu juga dengan pendapat Prema Bonanza bahawa terdapat perjanjian penyelesaian antara pihak-pihak berkenaan LAD seperti yang dibuktikan dalam surat bertarikh 14 Mac 2017 kerana ia menimbulkan persoalan sama ada Avantgarde masih boleh menuntut ganti rugi tambahan yang ditentukan walaupun terdapat perjanjian penyelesaian (lihat perenggan 47–55).]

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145; [2010] 5 CLJ 865, FC (refd)

Alpine Return Sdn Bhd v Matthew Ng Hock Sing & Ors [2021] MLJU 1923; [2022] 1 CLJ 120, HC (refd)

Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281, FC (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)

Bludream City Development Sdn Bhd v Kong Thye & Ors and other appeals [2022] MLRAU 13; [2022] 2 MLJ 241, CA (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)

Lam Su See v Prema Bonanza Sdn Bhd [2021] MLJU 713, HC (folld)

Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and another appeal [2022] MLJU 354; [2022] 5 CLJ 251, CA (refd)

Obata Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and other cases [2021] MLJU 1602, HC (refd)

Pinpoint Consortium (M) Sdn Bhd v Mammoth Empire Land Sdn Bhd [2020] 10 MLJ 60; [2019] 5 MLRH 39, HC (refd)

A *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31, FC (refd)
Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors [2008] 4 MLJ 852, CA (refd)
Star Effort Sdn Bhd v Tiong Sie Kwon & 10 Ors (Originating Summons No WA-24–7–02 of 2020) (unreported), HC (refd)
UE E&C Sanjia (M) Sdn Bhd v Lee Jeng Yuh & Anor and another appeal [2021]
B 6 MLJ 864, CA (refd)
Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd [2011] 2 MLJ 141; [2009] 6 CLJ 232, FC (refd)
Wong Kim Leng & Another v Ekovest Capital Sdn Bhd [2021] MLRHU 1982, HC (refd)

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Legislation referred to

Housing Development (Control and Licensing) Act 1966 s 24(2)(e)
Housing Development (Control and Licensing) Regulations 1989 regs 11(3), 12, Schedule H
D Limitation Act 1953 s 6(1)(a)
Rules of Court 2012 O 14

Lim Kien Huat (Lee & Lim) for the appellant.
Lai Chee Hoe (with Ooi Xin Yi) (Chee Hoe & Assoc) for the respondent.

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Leong Wai Hong JC:

INTRODUCTION

F **[1]** This appeal is one of the many cases filed by apartment and condominium buyers against developers as a result of the Federal Court's landmark decision dated 26 November 2019 in *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 (FC) ('Ang Ming Lee').

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[2] The appellant is the plaintiff in the sessions court below. The respondent is the defendant. Parties will be referred to as they were cited in the sessions court.

H **[3]** The plaintiff is the purchaser of a condominium built and sold by the defendant. The sale and purchase agreement dated 27 July 2012 ('SPA') stipulated delivery of vacant possession within 54 months from the date of the SPA failing which the defendant has to pay liquidated damages. The SPA also stated that the defendant was required to complete the common facilities
I within 54 months from the date of the SPA failing which the defendant also has to pay liquidated damages.

[4] The prescribed statutory period of 36 months for completion pursuant to the prescribed form under Schedule H of the Housing Development

(Control and Licensing) Regulations 1989 ('Regulations') had earlier, prior to the SPA, been extended to 54 months by the Controller of Housing ('Controller') pursuant to an application by the defendant.

[5] The plaintiff alleged vacant possession was delivered late by the defendant to the plaintiff based on 36 months for completion.

[6] The plaintiff relying on the decision in *Ang Ming Lee* alleged the extension to 54 months for completion is invalid. The plaintiff thus filed a suit against the defendant alleging that the defendant was liable for liquidated damages.

[7] It is pertinent to note the SPA was signed after the extension to 54 months was granted by the Controller.

[8] The plaintiff had filed for O 14 judgment for liquidated damages based on 36 months which was dismissed by the sessions court on 22 July 2020. The plaintiff appealed to me. I dismissed the appeal on 9 November 2022. The plaintiff has now filed an appeal to the Court of Appeal.

[9] These are my grounds of judgment. In my grounds I will review the significant recent judgments on cases filed by buyers and the legal defences now raised by developers post-*Ang Ming Lee.*

BACKGROUND FACTS

[10] Through a sale and purchase agreement dated 27 July 2012 the plaintiff, Avantgarde Arena Sdn Bhd purchased from the defendant a unit of residential unit known as Parcel No B-39-D, Storey No 39, Tower B, The Sentral Residences along with the common facility for the price of RM2,012,000.

[11] A significant change in the terms of the SPA is the statutory period for completion of 36 months pursuant to the prescribed form under Schedule H of the Regulations. This has been extended to 54 months by the Controller pursuant to an application by the defendant before the SPA was entered into.

SUIT BY PLAINTIFF AT SESSIONS COURT

[12] The plaintiff after the decision in *Ang Ming Lee* was delivered filed a suit on 25 February 2020 at the sessions court for liquidated damages together with interest and costs on the ground that the defendant had delivered vacant possession after 36 months from the date of the SPA.

[13] The defendant filed a defence pleading, inter alia, a settlement agreement evidenced by a letter dated 14 March 2017 (see affidavit of Datuk Ngu Ung Woo dated 20 May 2020 exh C), limitation, estoppel and unjust enrichment.

[14] The plaintiff then filed for O 14 judgment for liquidated damages based on 36 months which was not allowed by the sessions court. The plaintiff appealed to me.

TRIABLE ISSUES RAISED BY THE DEFENDANT

[15] The defendant submits that the defendant has a meritorious defence and there are triable issues to be tried on the following grounds:

(a) the plaintiff had full knowledge of the extension of time of 18 months obtained by the defendant from the Controller at the time they signed the SPA;

(b) the plaintiff has initiated the claim with the wrong mode;

(c) the filing of this suit is time-barred; and

(d) there is a settlement agreement evidenced by a letter dated 14 March 2017.

THE TEST FOR O 14 JUDGMENT UNDER OUR RULES OF COURT 2012 ('THE ROC 2012')

[16] The law is clear that as long as I find one triable issue I can dismiss this appeal.

[17] The *locus classicus* (a Latin phrase literally meaning 'classical place') on the test for O14 of the ROC is the case of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400. Mohamed Azmi SCJ (delivering the majority judgment of the court) said:

> *Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable*. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that *a complete defence need not be shown. The defence set up need only show that there is a triable issue*. Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and

undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand' (see *Cow v Casey* and *European Asian Bank AG v Punjab & Sind Bank* at p 516). (Emphasis added.)

A BRIEF REVIEW OF *ANG MING LEE*

[18] Before I consider the issues that the defendant alleges are triable issues, I will need to do a brief review of *Ang Ming Lee*. This is because in the cases that had been decided post-*Ang Ming Lee* the judges have to decide if the issues in those cases were covered by the *ratio decidendi* (a Latin phrase literally meaning 'rationale for the decision') of the decision in *Ang Ming Lee*. These cases were cited to me during the hearing of this appeal. Similarly, I have to do the same analysis.

[19] In *Ang Ming Lee* the facts are as follows. The buyers of condominium units in a new project had signed sale and purchase agreements ('AML SPAs') allowing them to claim liquidated damages ('LADs') against the developer if the developer failed to deliver vacant possession of the units to them within 36 months of the signing of the AML SPAs. The AML SPAs followed the statutorily prescribed contract of sale under Schedule H of the Regulations.

[20] Midway through the construction the developer applied to the Controller under reg 11(3) of the Regulations for an extension of the time to deliver vacant possession of the units to the buyers.

[21] Regulation 11(3) stated that the Controller could waive or modify any provision in the SPAs if he was satisfied that due to special circumstances or hardship or out of necessity, compliance with any provision in the SPAs was impracticable or unnecessary. The Controller rejected the application for extension of time.

[22] Pursuant to reg 12, the developer appealed against the rejection to the Minister of Urban Wellbeing, Housing and Local Government ('Minister'). By a letter ('Controller's decision') signed by a person on behalf of the Controller, the developer's appeal was allowed and was granted an extension of 12 months (statutory period of 36 extended to 48 months) to deliver vacant possession to the buyers, thereby prejudicing their right to claim for LADs under the AML SPAs.

[23] The buyers filed a judicial review against the Minister, Controller and developer to quash the Controller's decision. The High Court allowed the application and declared both the Controller's decision and reg 11(3) as null and void for being ultra vires the Housing Development (Control and Licensing) Act 1966 ('the HDA').

[24] The developer appealed to the Court of Appeal. Arising from the orders made by the Court of Appeal, both the developer and the buyers obtained leave from the Federal Court to ventilate five questions of public importance.

[25] In a landmark written decision dated 26 November 2019 the Federal Court allowed the appeals by the buyers after a wide-ranging review of delegated legislation and delegation of power in the context of administrative law. Tengku Maimun Tuan Mat CJ (delivering judgment of the court) answered the first three leave questions (GOJ 23 and 69) as follows:

(a) the Controller has no power to waive or modify any provision in the Schedule H contract of sale (GOJ 60);

(b) by s 24(2)(e) of the HDA, the Minister is empowered or given the discretion by Parliament to regulate and prohibit the terms and conditions of the contract of sale between the parties. Having regard to the object and purpose of the HDA, the words 'to regulate and prohibit' in s 24(2)(e) should be given a strict construction, in the sense that the Minister is expected to apply his own mind to the matter and not to delegate that responsibility to the Controller (GOJ 36); and

(c) therefore, reg 11(3) of the Regulations conferring power on the Controller to waive and modify the terms and conditions of the contract of sale is ultra vires the HDA (GOJ 60).

[26] Tengku Maimun Tuan Mat CJ also reviewed the objective of the HDA as pronounced in *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 (FC), *Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors* [2008] 4 MLJ 852 (CA) and *Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd* [2011] 2 MLJ 141; [2009] 6 CLJ 232 (FC) and said, in a now much-cited passage:

> [40] *The Act being a social legislation designed to protect the house buyers, the interests of the purchasers shall be the paramount consideration against the developer.* Parliament has entrusted the Minister to safeguard the interests of the purchasers and the Minister has prescribed the terms and conditions of the contract of sale as per Schedule H. We find no contrary indication in the language, scope or object of the Act that such duty to safeguard the interests of the purchasers may be delegated to some other authority. (Emphasis added.)

Alleged triable issue (a) — The plaintiff had full knowledge of the extension of time of 18 months obtained by the defendant from the Controller at the time they signed the SPA

[27] The defendant contends that unlike in *Ang Ming Lee*, the plaintiff was aware of the 54 months when they signed the SPA and therefore is bound by it and cannot now argue that they are not bound by the term of 54 months.

[28] The defendant relies on a High Court decision by Mariana bt Hj Yahya J in *Star Effort Sdn Bhd v Tiong Sie Kwon & 10 Ors* (Originating Summons No WA-24–7–02 of 2020) (unreported) whereby the court had ruled in favour of the developer against buyers who had entered into SPAs after the extension was granted on the ground of estoppel and unjust enrichment. Her Ladyship said in her written grounds of decision dated 31 January 2021:

> [24] *This court agrees with the plaintiff's submission that the defendants are further attempting to unjustly enrich themselves*. This is despite the fact that they knew and were fully aware that they were only expecting completion of the property within 48 months as specified in the SPA. It is prima facie unjust for the defendants to now insist on the payment of LAD for an additional 12 months when the intention of both parties are so clear that the completion period is 48 months. *In such circumstances the principle of estoppel applies* ... (Emphasis added.)

[29] The defendant also relies on the Federal Court decision in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453 whereby the Federal Court said the doctrine of unjust enrichment is applicable if the following three conditions are satisfied:

(a) was the plaintiff enriched?

(b) was the enrichment at the expense of the defendant? and

(c) was the enrichment unjust?

[30] The defendant contends all three conditions are satisfied here.

[31] The defendant further relies on *Alpine Return Sdn Bhd v Matthew Ng Hock Sing & Ors* [2021] MLJU 1923; [2022] 1 CLJ 120 ('Alpine Return'), where Mohd Nazlan Mohd Ghazali J had ruled in favour of the developer and against the buyers and said:

> [93] Now it must be reiterated and clarified lest it be misunderstood that in this case the extension letter and the extension are undoubtedly void as a result of *Ang Ming Lee*. *However, the defendants should be estopped from not honouring the terms of the SPAs, even though the timeline of 60 months in the SPAs emanated from the Extension. The SPAs themselves although prescribed under Schedule H to the Regulations, are essentially still contractual documents that bind the contracting parties.* In *Loh Chow*

Sang & Anor v Meru Valley Resort Bhd [2002] 2 MLJ 666 for example, it was held that the sale and purchase agreement made under the HDA need not be read alone but may be read together with the Contracts Act 1950.

...

Conclusions

[97] Whilst it is crystal clear from *Ang Ming Lee* that the Housing Controller has no powers to grant extensions under reg 11(3) which is thus ultra vires the HDA, I do not see how the counterclaims by the defendants for LAD can be said to be a genuine pursuit to enforce the right of the weaker party against a defaulting stronger party (the plaintiff) which could instead potentially result in the defendants gaining an unfair benefit at the expense of the plaintiff. *The plaintiff did not commit any illegality, irregularity or depart from the provisions of the Regulations in force at the material time.* The plaintiff adhered to the requirements of the Regulations, applied for the extension under reg 11(3) which was allowed by the Housing Controller before the amendments were made to cll 25 and 27, and prior to the execution of the SPAs with the defendants. *There was no unilateral amendments, no amendments after the execution of the SPAs*, and there was no appeal to the relevant Minister either. And there was absolutely no denial of the right to be heard to the defendants as the purchasers.

[32] The plaintiff in their submissions said that *Ang Ming Lee* is applicable and binds this court on the doctrine of stare decisis (a Latin phrase that means *to stand by decided matters*).

MY ANALYSIS

[33] On the facts of this appeal the defendant before starting and selling the project knew that the size of the project would require a completion period of more than 36 months. So, they applied for extension to 54 months under HDA. This extension was granted before the plaintiff here agreed to buy. So, the defendant here can be said to have arranged their construction schedule; and the plaintiff here-when agreeing to buy based on a completion period of 54 months — had arranged their housing needs and/or purchase plans based on 54 months.

[34] Based on these facts, there is much force for the doctrine of estoppel to apply. I need only cite the Federal Court decision in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331. This case is the *locus classicus* (a Latin phrase meaning literally 'classical place') on the doctrine of estoppel in Malaysian.

[35] Gopal Sri Ram JCA (delivering judgment of the court) said at pp 344–348:

The time has come for this court to recognize that the doctrine of estoppel is a flexible

principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless. Edgar Joseph Jr J (as he then was) in an illuminating judgment in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at p 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1952.

The doctrine may be applied to enlarge or to reduce the rights or obligations of a party under a contract: *Sarat Chunder Dey v Gopal Chunder Laha LR* 19 IA 203; *Amalgamated Investment and Property Co Ltd (In liquidation) v Texas Commerce International Bank Ltd* [1982] 1 QB 84; [1981] 3 All ER 577; [1981] 3 WLR 565. It has operated to prevent a litigant from denying the validity of an otherwise invalid trust (see, *Commissioner for Religious Affairs, Trengganu & Ors v Tengku Mariam bte Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222) or the validity of an option in a lease declared by statute to be invalid for want of registration (see, *Taylor Fashions Ltd v Liverpool Victoria Friendly Society* [1981] 1 All ER 897; [1981] 2 WLR 576). It has been applied to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent (see, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; [1995] 3 MLJ 331 at 345 *Spiro v Lintern* [1973] 3 All ER 319; [1973] 1 WLR 1002). It may operate to bind parties as to the meaning or legal effect of a document or a clause in a contract which they have settled upon (see the *Amalgamated* case) or which one party to the contract has represented or encouraged the other to believe as the true legal effect or meaning: *American Surety Co of New York v Calgary Milling Co Ltd* (1919) 48 DLR 295; *De Tchihatchef v Salerni Coupling Ltd* [1932] 1 Ch 330 *Taylor Fashions.*

We would add that it is wrong to apply the maxim 'estoppel may be used as a shield but not a sword' as limiting the availability of the doctrine to defendants alone. Plaintiffs too may have recourse to it ...

We take this opportunity to declare that the detriment element does not form part of the doctrine of estoppel. In other words, it is not an essential ingredient requiring proof before the doctrine may be invoked. *All that need be shown is that in the particular circumstances of a case, it would be unjust to permit the representor or encourager to insist upon his strict legal rights. In the resolution of this issue, a judicial arbiter would, when making his assessment of where the justice of the case lies, be entitled to have regard to the conduct of the litigant raising the estoppel.* This may, but need not in all cases, include the determination of the question as to whether the particular litigant had altered his position, although such alteration need not be to his detriment. (Emphasis added.)

[36] To my mind, the two issues of estoppel and unjust enrichment against the plaintiff here who had entered into the SPA based on 54 months — after the extension had been obtained-are triable issues which necessitate me granting leave to defend.

[37] *Ang Ming Lee* did not consider these two issues of estoppel and unjust

enrichment as there the SPA was entered before the extension had been obtained.

[38] I acknowledge that the Federal Court in *Ang Ming Lee* had clearly held, and correctly so held, that the HDA is a social legislation designed to protect the interests of the house buyers. But on the facts of this appeal, to my mind it is a triable issue whether the plaintiff here can invoke the assistance of this doctrine of social legislation to prevail over the two doctrines of estoppel and unjust enrichment.

[39] For completeness, I should also state that the Court of Appeal has recently on 7 September 2021 delivered written grounds in *UE E&C Sanjia (M) Sdn Bhd v Lee Jeng Yuh & Anor and another appeal* [2021] 6 MLJ 864 ('UE E&C Sanjia') on two suits filed by buyers of units in a housing project who terminated their sale and purchase agreements on the ground that the extended completion period of 48 months granted by the Controller was illegal under the HDA.

[40] Hashim Hamzah JCA (delivering the judgment of the court) held that the agreements were illegal relying on *Ang Ming Lee*. Hashim Hamzah JCA said:

> [48] To summarise, we are of the view that the SPAs are null and void from their inception because the Housing Controller has no power under the law to grant any extension of time on the delivery of vacant possession and completion of the common facilities beyond the 36 months period prescribed in Schedule H to the 1989 Regulations. *Ekovest Capital Sdn Bhd (dahulu dikenali sebagai Prompt Capital Sdn Bhd) v Choo Teik Shiong & Ors* [2022] MLJU 715 pp 14–16. Therefore, the learned trial judge has not erred in ordering the refund of all payments made by plaintiffs (purchasers) to the defendant (developer). (Emphasis added.)

[41] A perusal of the grounds of decision of the court of appeal in *UE E&C Sanjia* would show that issues of estoppel or unjust enrichment did not arise on the facts of that case as the buyers were not relying on the agreements to sue for further liquidated damages. Therefore, *UE E&C Sanjia* does not assist the plaintiff here.

Alleged triable issue (b) — The plaintiff has initiated the claim with the wrong mode

[42] The defendant contends that the plaintiff must file a judicial review to challenge and quash the decision of the Controller and not a writ against the defendant here. The defendant relies on *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 5 CLJ 865, *Obata Ambak Holdings Sdn Bhd v Prema Bonanza Sdn*

Bhd and other cases [2021] MLJU 1602 (HC), Mohd Firuz Jaffril J and the Court of Appeal decision in *Bludream City Development Sdn Bhd v Kong Thye & Ors and other appeals* [2022] MLRAU 13; [2022] 2 MLJ 241 (CA).

[43] In my view this issue has been decided in favour of the purchaser in *Lam Su See v Prema Bonanza Sdn Bhd* [2021] MLJU 713 Quay Chew Soon JC ('Lam Su See') whereby the judge held that the extension can be disregarded without the need for judicial review proceedings to set it aside (see GOJ 28–32).

[44] Based on the doctrine of *stare decisis* (a Latin phrase meaning literally 'to stand by decided matters') I follow the decision in *Lam Su See* since the Court of Appeal had affirmed this decision on 18 October 2021 and leave to appeal to Federal Court had been denied on 2 March 2022.

[45] I do note that the Court of Appeal had as yet not released any written grounds for its decision in *Lam Su See*. That aside, I think a case can be said that the plaintiff need not file for judicial review to quash the extension since the Federal Court in *Ang Ming Lee* has already held that such extension as a matter of law was ultra vires the HDA (GOJ 60).

[46] In the premises I hold that the contention by the defendant that the plaintiff has initiated the claim with the wrong mode is not a triable issue.

Alleged triable issue (c) — The filing of this suit is time-barred

[47] The defendant submits that the plaintiff's claim which is premised on the EOT is barred by the limitation period provided for under s 6(1)(a) of the Limitation Act 1953:

> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —
>
> (a) Actions founded on a contract or on tort ...

[48] The defendant relies on the Court of Appeal's decision in *Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and another appeal* [2022] MLJU 354; [2022] 5 CLJ 251, and submitted that six years would have lapsed on 27 July 2018 as the SPA is dated 27 July 2012. It is clear that the plaintiff's claim is time-barred.

[49] I hold that this is a triable issue.

Alleged triable issue (d) — There is a settlement agreement evidenced by a letter dated 14 March 2017

[50] The defendant contends parties had agreed to a settlement for the liquidated damages as evidenced by letter dated 14 March 2020 (see affidavit of Datuk Ngu Ung Woo dated 20 May 2020 exh C). The plaintiff disagreed and says he is not bound by it.

[51] The defendant relies on the case of *Pinpoint Consortium (M) Sdn Bhd v Mammoth Empire Land Sdn Bhd* [2020] 10 MLJ 60; [2019] 5 MLRH 39 (HC) ('Pinpoint Consortium') where Wong Kian Kheong J held:

> [1] *This appeal raises a novel question of whether a settlement agreement regarding liquidated damages for late delivery of vacant possession (VP) of 'housing accommodation' between a housing developer and home buyer made pursuant to s 64 of the Contracts Act 1950 (CA) is invalid under the Housing Development (Control and Licensing) Act 1966 (HDA) and Housing Development (Control and Licensing) Regulations 1989 (HDR) read with s 24 CA ...*
>
> ...
>
> [13] I cannot accept the plaintiff 's contention that there has been a miscalculation of the amount of liquidated damages due from the defendant to the plaintiff under cll 25 and 27. This is because *whatever sum of liquidated damages is actually owed by the defendant to the plaintiff, the SA constitutes a full and final settlement of any dispute between the plaintiff and the defendant regarding liquidated damages due under cls 25 and 27*.
>
> ...
>
> [16] *I am of the view that housing developers and home buyers may enter into settlement agreements to settle any dispute arising from SPA's concerning housing accommodation*. The reasons for this view are as follows: (1) housing developers and home buyers have the freedom of contract to enter into settlement agreements regarding housing accommodation — please see the judgment of Gopal Sri Ram FCJ in the Federal Court in *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2009] 3 MLRA 1, at [10]. Such a freedom can only be restricted or abrogated by clear words of written law. (Emphasis added.)

[52] The defendant also relies on the case of *Obata-Ambak* where Mohd Firuz Jaffril J had said:

> [67] ... *I therefore apply the doctrine of estoppel in Suit 301 and Suit 305 and accept that the settlement agreements signed by the plaintiffs are conclusive proof of the terms which they have settled upon. Neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow them to do so. Waiver of rights is a direct result of the settlement letters signed by the plaintiffs* ... (Emphasis added.)

[53] The defendant further relies on another decision of Mohd Firuz Jaffril J

in *Wong Kim Leng & Another v Ekovest Capital Sdn Bhd* [2021] MLRHU 1982 ('Wong Kim Leng') where the judge said:

> [21] In addition, *I also take the view that by virtue of the settlement agreement(s) dated 16 May 2019 and 27 June 2019, the defendants are estopped from claiming further LAD*. Ariff Yusoff JCA in case of *Oxbridge Heights* [2014] MLJU 1932; [2015] 3 MLRA 59; [2015] 2 CLJ 252 *referring to* s 64 of the Contracts Act 1950, affirmed the settlement agreement entered into between the developer and the purchaser. (Emphasis added.)

MY ANALYSIS

[54] In *Pinpoint Consortium*, *Obata-Ambak* and *Wong Kim Leng* the courts there held that the settlement agreements were binding on the buyers.

[55] I am of the opinion the settlement agreement clearly raises a triable issue whether the plaintiff can still sue for additional liquidated damages.

DECISION

[56] The defendant has raised triable issues as stated by me above. I therefore dismiss this appeal by the plaintiff against the dismissal of their summary judgment application by the sessions court with costs subject to allocatur.

Appeal dismissed.

Reported by Ashok Kumar